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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 569.

UNITED STATES OF AMERICA on the relation of ARTHUR KASSIN,
Petitioner,
against
HON. RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HON. GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

BRIEF FOR PETITIONER.

Opinions Below.

A memorandum opinion was filed in the District Court but is not officially reported (R. 158). The United States Circuit Court of Appeals for the Second Circuit affirmed the order dismissing the writs of habeas corpus and certiorari in a *per curiam* opinion reported in 73 Fed. (2d) 274 (R. 166 *et seq.*).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 5, 1934. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

Petitioner and others were indicted in the United States District Court for the Southern District of Florida for alleged violations of Section 37, U. S. C. C., and Section 592 of Title 12 of the United States Code. All of the charges in the indictment relate to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of said bank (R. 13-37). Petitioner was apprehended within the Southern District of New York and arraigned before a United States Commissioner in that District on a complaint praying for his removal to the Southern District of Florida (R. 3, 10, 12, 37). Hearings were held before said Commissioner and the depositions of all of the defendants named in the indictment who were then in custody were taken and submitted to the Commissioner (R. 37-158). Removal of petitioner was recommended by the Commissioner and an order to that effect was signed by a District Judge (R. 158). Thereupon petitioner sued out writs of habeas corpus and certiorari, to which the United States Marshal and the Commissioner duly filed returns (R. 1-10). Said writs were dismissed in the District Court, and the order of dismissal was affirmed upon appeal (R. 158-162; 166 *et seq.*).

Analysis of Facts.

Each of the offenses charged in the indictment relates to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of that bank by the payment of forged checks drawn on the account of a depositor of that bank. Petitioner is charged both as a conspirator and as an aider and abettor (R. 13-37). After introducing a certified copy of the indictment (R. 37-38, 53-54), two witnesses were called to identify petitioner as one of the defendants named therein. The first of these witnesses, Augustus O. MacDonnell (R. 39-44, 53-56, 56-63), described himself as the vault custodian of the

St. Augustine National Bank of St. Augustine, Florida, forty miles away from Jacksonville (R. 39, 60), and identified two cards, one as an agreement for the leasing of a safe deposit box in said bank (signed as he claimed by one Arthur Starke), and the other as a card reflecting the dates upon which said Starke visited said safe deposit box (R. 39-41). He testified that in the course of his duties in the aforementioned bank he had observed Arthur Starke, whom he claimed to be the petitioner, visit the aforementioned safe deposit box (R. 41-42). The second witness, one Gene Zapf (R. 44-53), manager of the Casa Marina Hotel of Jacksonville Beach, Florida, twenty miles away from Jacksonville (R. 53), testified that petitioner had been a guest at said hotel and identified a card which he produced as the registration card signed by petitioner under the name of Arthur Starke when he engaged a room in said hotel (R. 44-47). *This was the whole of the Government's direct case* (R. 63, 68).

It was stipulated by the Government that if certain named persons were called by petitioner to testify to his character, they would in each instance state that the petitioner bore an excellent reputation for honesty and veracity (R. 68).

Petitioner, in his own behalf (R. 68-74), stated that while he had been in Florida on a number of occasions, the purpose of his visits was entirely unrelated to any of the matters alleged in the indictment; that he had gone there to establish a business venture with one Arthur Feinberg, whom he had met on a previous trip to Miami, Florida (R. 68-71). Petitioner denied knowing any of the other defendants named in the indictment and further denied that he had any complicity in either the conspiracy or any of the acts referred to in the indictment and maintained his complete innocence of all charges against him (R. 71-72). With respect to the business venture of petitioner in Florida, his testimony is corroborated in all aspects by that of his wife (R. 74).

Prior to the time that petitioner testified, applications had been made in the District Court for orders directing the issuance of open commissions to take the testimony of all defendants named in the indictment who were in custody. The

taking of these depositions was attended by counsel for the Government and petitioner (R. 63-64, 89, 129, 145), as well as Special Agent Roger L. Main (R. 101, 126). Each of these persons whose depositions were so taken, testified under oath in an unequivocal manner that petitioner was not implicated in any manner in the commission of any of the crimes alleged in the indictment to which they had pleaded guilty and had been sentenced. These persons testified in substance that although they were in a position to know who participated in the commission of the offenses, they had never heard of or known of the existence of the petitioner as one of the participants in the crimes charged.

Thus John Dickson, then incarcerated at Atlanta Penitentiary, testified that he did not know anyone by the name of Kassin, and when shown a photograph of petitioner, stated that he had not seen and did not know that individual and that said person was in nowise connected with any of the acts of forgery with respect to the checks of Almours Securities, Inc., or in the misappropriation of funds of the Florida National Bank of Jacksonville (R. 146, 147, 152). Dickson further stated that between April 1, 1932, and May 13, 1932, the dates referred to in the indictment, he had occasion to see and talk to all persons connected with the series of operations referred to in the indictment and never spoke to nor saw petitioner during that time or at any other time, although had petitioner participated in the crimes charged in the indictment, Dickson had been in a position to have known and met him at some time during the commission of the crimes (R. 153, 155).

Richard Gillman, another defendant, then in custody at the Florida State Penitentiary, after being shown a photograph of petitioner, stated that he did not know the individual represented by the photograph and theretofore had no contact or dealings with him; that, although he knew all the persons connected with the crimes charged in the indictment, he had never seen, discussed with or heard discussed in the presence of petitioner any of the details of the crimes mentioned in the indictment; and that to his knowledge petitioner was not connected with such crimes (R. 90-92, 103, 106).

David N. Chadwick, another of the defendants who stated he was familiar with the major portion of the defendants named in the indictment, testified, when shown a photograph of petitioner, that he did not know petitioner and was not in anywise connected with the conspiracy to defraud the Florida National Bank of Jacksonville (R. 129-131). Cross-examined, Chadwick reiterated his assertion that he had never seen petitioner at any time and that petitioner was not connected with the crimes charged in the indictment (R. 131, 134, 137).

Julius L. Chadwick, another of the defendants whose deposition was taken, stated, when shown a photograph of petitioner, that he did not know the person represented by such photograph and that that person had nothing to do with the transactions referred to in the indictment (R. 138).

Leo Carr, whose deposition was also introduced in evidence, testified that he had been in a position to know all of the persons who participated in the crimes charged in the indictment, and that petitioner did not participate therein. Shown a photograph of petitioner, he stated that he had never seen nor heard of petitioner, nor did he know one Arthur Starke, who had registered in the Casa Marina Hotel at Jacksonville Beach, Florida, in April, 1932, and while he knew every person connected with the crimes charged in the indictment, neither petitioner nor said Arthur Starke participated in such crimes (R. 139-140, 144-145).

MacDonnell, who had been fully examined by the Assistant United States Attorney in May, 1933 (R. 37), was recalled a year later (May 12, 1934; R. 76, 79) to testify as to certain facts not previously mentioned. He testified that he "thought" he had seen one Goldberg, another defendant, enter the lobby of the St. Augustine National Bank in the company of petitioner. (This bank was totally disconnected with the defrauded bank.) As the basis for this belief he stated that he had seen petitioner and said Goldberg enter the lobby of the bank together (R. 80, 81, 82-83). He could not fix the date of this occurrence other than in a general way (R. 80). Cross-examined, he admitted that he had not seen said Goldberg and petitioner together at any time while they were

at the bank; that he did not see them leave the bank together (R. 85-86). Petitioner unequivocally denied ever being in the company of Goldberg (R. 108-109). There was no proof adduced that the contents of the vault in the St. Augustine National Bank had any relationship in any respect whatsoever to the matters charged in the indictment.

Application was thereafter made for an order directing the issuance of an open commission to take the testimony of the aforementioned Goldberg. Upon being interviewed by an attorney, Irving Laudeutcher, said Goldberg stated he absolutely declined to make any deposition because he was then awaiting trial under the indictment (R. 109, 110). Interrogated by the Assistant United States Attorney, he (Laudeutcher) said that said Goldberg had stated to him that petitioner was absolutely innocent of the commission of any of the offenses named in the indictment (R. 113-114).

As a rebuttal witness the Government called Special Agent Roger L. Main of the Department of Justice (R. 116-128), who was permitted over the persistent objection and exception by counsel for petitioner (R. 117, 119-121, 122, 123, 124-125, 127-128) to testify concerning conversations alleged to have been had by him with David Chadwick and John Dickson, two of the co-defendants who had given depositions favorable to petitioner. In substance, Special Agent Main testified that in these conversations David Chadwick and John Dickson made statements inconsistent with the testimony given by them upon the taking of the depositions; that whereas when David Chadwick and John Dickson made depositions to the effect that petitioner was not known to them and was innocent of any wrongdoing, each of them had stated to Special Agent Main that petitioner was known to them and had in fact participated to a large degree in the commission of the offenses named in the indictment (R. 118, 120-124, 125-126). Nothing in any of the depositions may be said to constitute a foundation for such hearsay and prejudicial testimony. There is no suggestion even in the deposition taken from the said David Chadwick and John Dickson that they had made contradictory or inconsistent statements at another time. It was pointed out

to the Commissioner that no proper foundation had been laid for the introduction of this testimony, since to be admissible in evidence such statements, with the time, place and circumstances under which they were made, must be brought to the attention of the witnesses who were alleged to have made them. However, the Commissioner overruled these objections.

Scrutiny of the record fails to reveal *any* evidence connecting the petitioner with *any* of the crimes charged in the indictment. All of the evidence introduced by the Government tended merely to establish merely that the petitioner was in the State of Florida at various times, a fact admitted by the petitioner when testifying in his own behalf. Nothing was shown connecting the petitioner, while in Florida or elsewhere, with the crimes charged in the indictment.

The Circuit Court of Appeals granted a five-day stay in this case pending application to this Court for a stay pending certiorari. Such an application was made to Mr. Justice Harlan F. Stone. On that application Mr. Justice Stone required the Solicitor General to submit "substantial evidence," or evidence "to go by" warranting the conclusion that there was probable cause in this case. A memorandum of the facts on this matter was submitted to Mr. Justice Stone by the Solicitor General. A memorandum on the facts was also submitted on behalf of the petitioner. Mr. Justice Stone granted the stay to the petitioner pending the determination on the application for certiorari.

Thus a case is presented to this Court in which any and every fact which relates to the proof of probable cause exculpates the petitioner. We do not ask this Court to intervene on conflicting, debatable or controversial issues of fact as to the guilt or innocence of the petitioner. We do ask this Court to intervene in a case of this character where all of the evidence which has any logical or material relevancy on the issue of probable cause is overwhelmingly in favor of the petitioner. There was and is no probable cause, or any cause, to warrant petitioner's removal to Florida.

Questions Presented.

1. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to determine whether there is probable cause to warrant removal and to overrule, if necessary, the finding of the Commissioner on this point.

2. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to review the finding of probable cause made by the Commissioner, and, if necessary, to overrule such finding.

3. Whether the power and jurisdiction of the District Court and, upon appeal, of the Circuit Court of Appeals to review the finding of probable cause made by the Commissioner is limited strictly to a determination of the *honesty* of the Commissioner in considering the evidence.

4. Whether there was any evidence from which to find probable cause of the connection of the petitioner with the crimes charged in the indictment so as to warrant his removal.

5. Whether in a removal proceeding a United States Commissioner may proceed without regard to the rules of the common law governing the admissibility of evidence, and whether, in such event, the determination of the said Commissioner is valid and binding.

Specifications of Errors to Be Urged.

1. There was no probable cause for believing petitioner guilty of the offenses charged in the indictment so as to warrant his removal.

2. It was error for the District Court and the Circuit Court of Appeals to refuse to determine that there was no probable cause to warrant petitioner's removal, and not to overrule the finding of the Commissioner to the contrary.

3. It was error for the District Court, upon the hearing of returns to the writ of habeas corpus and certiorari herein, and for the Circuit Court of Appeals, upon appeal from the order dismissing such writ, to limit review of the Commissioner's finding of probable cause to a determination of the "honesty" of the Commissioner in considering the evidence.

4. Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

ARGUMENT.

I.

There was no probable cause for believing the petitioner guilty of the offenses charged in the indictment so as to warrant removal, and it constituted grave error to refuse to review the Commissioner's contrary finding and/or to limit the review merely to the Commissioner's "honesty," and in failing to determine whether there was any evidence sufficient to support the finding of probable cause made by the Commissioner.

(Assignments of Error Nos. 1-7, R. 162-163.)

Primarily the problem before the Commissioner, the District Court and the Circuit Court of Appeals was whether evidence had been presented sufficient to warrant a finding of probable cause to believe that petitioner committed the offenses charged in the indictment. While the District Judge approved the finding of the Commissioner that there was probable cause, the District Judge did so upon the basis only of the evidence adduced from the witnesses MacDonnell and Zapf and did not directly pass upon the impropriety of the

admission of the testimony of the witness Main (to which reference will be hereinafter made under II, *infra*), holding that even without such testimony there was probable cause for removal. Petitioner contended below and it was specifically held by the Circuit Court of Appeals that the testimony of said Main was incompetent as hearsay. The case for removal must therefore necessarily rest upon the testimony of the witnesses first referred to (the subject-matter of which will be discussed later in this point) and the certified copy of the indictment found in the demanding jurisdiction.

The Circuit Court of Appeals made no ruling with respect to the crucial question of the existence of probable cause for removal and failed to consider other matters vitally affecting the scope of review. That Court, relying upon a prior ruling in *United States ex rel. Scharlon* v. *Pulver*, 54 Fed. (2d) 261, declared that its power of review ended once it was determined that the Commissioner had accorded petitioner a fair hearing. It said:

> "We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause. *Tinsley* v. *Treat*, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evidence which the accused chooses to bring in; and no doubt his judgment must be his own, based upon all the evidence before him, though the indictment is necessarily hearsay. But we decided, after as careful consideration as we could give it, in *U. S. ex rel. Scharlon* v. *Pulver*, 54 Fed. (2) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers, we did not commit ourselves to the sufficiency of a mere ritual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defense, he has not really done so. Such cases will be very rare;

this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. *U. S. ex rel. Kohl* v. *Mulligan*, 54 Fed. (2) 1085; *U. S. ex rel. Pugliese* v. *Pulver*, 61 Fed. (2) 1044; *U. S. ex rel. Frank* v. *Mulligan*, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread *U. S. ex rel. Hughes* v. *Gault*, 271 U. S. 142. Such appeals are therefore ordinarily fruitless."

In *United States ex rel. Scharlon* v. *Pulver*, *supra*, 54 Fed. (2d) 261, the Circuit Court of Appeals said (p. 263):

"There is unquestionably much confusion in the books as to what is open for review upon such proceedings. While it is uniformly held that the indictment makes a *prima facie* case, what that means is not always clear. It may be no more than to establish a legal presumption of probable cause; on the other hand, it may itself constitute evidence of that fact. Very different consequences follow from these two views, pressed to their conclusions. A true presumption is not evidence, though it supplies its place and requires the other party to proceed with the negative. Unless he does, he loses; when he does, the presumption is out of the case, and the issue is open. On this view, therefore, as soon as the accused puts in any proof, except possibly a bare denial—the equivalent of a plea of not guilty—the indictment disappears, the prosecution must proceed with evidence of probable cause, and the commissioner must decide only between the evidence in denial and the rebuttal. This we understand to be the doctrine laid down in *Meehan* v. *U. S.*, 11 F. (2d) 847 (C. C. A. 6), and *Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9).

"The other view results practically in circumscribing the writ to an examination of the regularity of the proceeding; that is, as to whether the commissioner allowed the accused proper latitude in presenting his case, and really considered his proof. If he has done so, his conclusion as to the existence of probable cause is irreviewable, and the evidence in rebuttal is never important except in so far as he might without it have found the evidence of the accused

persuasive. If the prosecution chooses to take the chance that the indictment alone will satisfy him, it will always be safe on habeas corpus. Perhaps the judge who orders the removal may think otherwise, but that is a different question. All this necessarily follows from a well-settled rule that in such cases—which are only a species of habeas corpus in general—the writ does not search the correctness of the conclusion as matter of fact. It only examines whether there was any evidence which could justify the finding of probable cause. (Citing cases.) Once it be conceded that the indictment is itself evidence, the testimony of the accused can meet it only as proof against proof, and it will be alone enough to support the finding. The rebuttal is only cumulative, and it is never necessary to consider it upon habeas corpus.

* * * * * * *

"We hold therefore that when the accused has had full opportunity to put in his proof and it has been actually considered, he can get no relief on habeas corpus."

That the indictment is not conclusive evidence of probable cause in a removal proceeding is unquestionable. *Tinsley* v. *Treat,* 205 U. S. 20, cited with approval in the opinion below. That the removal cannot be made summarily and arbitrarily and is a judicial rather than a mere ministerial act is likewise indisputable. *Beavers* v. *Henkel,* 194 U. S. 73, quoted with approval in *Tinsley* v. *Treat, supra,* as follows:

"It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which bught not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting §1014, Rev. Stat., which requires

that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial, act."

From a procedural standpoint a *prima facie* case for removal is made out with the introduction of a certified copy of the indictment found in the demanding district and proof of the identity of the person, whose rendition is sought, as the person named in that indictment. Yet, the technical sufficiency obtained in this manner is in essence arbitrary; the result, perhaps, of a desire to give full faith and credit to proceedings in another jurisdiction. Until the time that the defendant in a removal proceeding is required to *go forward* in an attempt to establish his innocence and *d fortiori* the lack of probable cause to believe him guilty, it is of little moment as a practical matter what importance is attached or weight given to the presumption of probable cause. The crucial question is how far shall the arbitrary legal inference serve the prosecution as an element of proof when the person whose rendition is sought *goes forward* and adduces proof of his innocence.

Even in a removal proceeding an indictment is merely a formal accusation not to be considered as evidence of the guilt of petitioner. It has, therefore, not the slightest degree of significance in the determination of the question of probable cause in a case such as the one at bar, where petitioner has offered irrefrageable evidence establishing his innocence. Moreover, the mantle of protection afforded by the application of the rule that a man is presumed innocent until his guilt is established beyond a reasonable doubt is also available in a large degree to the defendant in removal proceedings. This presumption of innocence drains whatever strength may be left to the presumption of probable cause after its main support, the indictment, is exposed as merely a formal accusation or charge. The conclusion, then, is inescapable that while the indictment was efficacious enough with proof of identity to complete a *prima facie* case for removal and to compel petitioner to go forward with

his proof, it has no legal value as evidence as soon as doubt is raised by petitioner's proof as to the existence of probable cause. Then, the presumption afforded by the indictment is destroyed as a potent factor for all purposes.

In the case at bar petitioner effectively and conclusively established that there was no probable cause for removal. That a conspiracy was shown to have existed does not justify a finding that petitioner was a participant therein. Five admitted participants in the conspiracy (David N. Chadwick, Julius L. Chadwick, Leo Carr, Richard Gillman and John Dickson) all unequivocally denied that petitioner was connected with the conspiracy in any way. MacDonnell's testimony in nowise tended to establish probable cause. The crimes charged in the indictment relate to acts designed to defraud the Florida National Bank *of Jacksonville, Florida,* and to a conspiracy so to do (R. 13-37). MacDonnell was the vault custodian of the St. Augustine National Bank at *St. Augustine, Florida, forty miles away from Jacksonville* (R. 39, 61). Both banks were wholly unconnected with each other. No reasonable relationship exists between the rental of the safe deposit box and the commissions of the acts to defraud the bank. No inferences can logically or reasonably be drawn from the isolated transaction stated by MacDonnell and the conspiracy to defraud the Florida National Bank at Jacksonville by the means set forth in the indictment. This proof was relevant only on the issue of identity and there being no contention made by relator of an alibi, proof of such an overt act could not possibly connect relator with the crimes charged in the indictment. Gene Zapf was a clerk at the Casa Marina Hotel at Jacksonville Beach, Florida, which was twenty miles away from the bank in Jacksonville (R. 44, 53). Even if this testimony proves overt act 16 of the indictment, the proof of such overt act standing alone, like the testimony of MacDonnell, is not proof connecting petitioner with the conspiracy. No reasonable relationship exists between the act of registration at the hotel and the defrauding of a bank located twenty miles away. Consequently, this testimony has no bearing on the question of the connection of petitioner with the conspiracy.

MacDonnell originally testified on May 16, 1933 (R. 37, 39). At that time he was fully examined by the Assistant United States Attorney. He was recalled a year later, on May 12, 1934 (R. 76, 78, 79), to testify with respect to certain facts not previously mentioned. He could not fix the date when he claimed he saw petitioner and Goldberg together other than in a general way (R. 80). Furthermore, on cross-examination he admitted that he had not seen Goldberg and petitioner together at any time on the occasion he claimed they were at the bank and that he had not seen them leave the bank together. His entire testimony was based on his "thought" that he had seen them enter the lobby of the bank together (R. 80, 81, 85-86). Even if these facts were as testified by MacDonnell, mere association on a single occasion had no relevancy or probative potency to connect petitioner with the crimes charged in the indictment. The Government did not attempt to contradict the petitioner's testimony as to the contents of his safe deposit box, and no proof was offered to connect the contents of that safe deposit box with any of the acts charged in the indictment whereby the Florida National Bank of Jacksonville was defrauded. The evidence adduced in the Government's direct case placed petitioner in cities twenty and forty miles from the bank which was defrauded. These facts do not afford any indicia of guilt and have no bearing on the question of probable cause.

Affirmatively, it was shown by petitioner that he bore an excellent reputation for honesty and veracity. Petitioner steadfastly maintained his innocence and fully explained the facts surrounding his visit to Florida in 1932. He denied knowing any of the persons named in the indictment as co-defendants and co-conspirators with him and in this he was corroborated by all of the alleged co-conspirators who were in custody. Cross-examination of petitioner failed to shake his testimony or to adduce any contradictions therein. Throughout the entire proceedings the Government was not only unable to produce any direct evidence connecting petitioner with the commission of any of the acts charged in the indictment by means whereof the Florida National Bank of

Jacksonville was defrauded, but it failed to submit *any* evidence warranting the removal.

Johnson v. *Hotchkiss, supra* (C. C. A. 9), 35 Fed. (2d) 914, is on its facts strikingly similar to the case at bar. There, defendant was indicted for conspiracy to violate the National Prohibition Act. Before the Commissioner defendant testified in his own behalf and denied his implication in the commission of any of the offenses charged in the indictment. The Circuit Court of Appeals summarized other evidence before the Commissioner as follows:

> "Four of the defendants named in the indictment also testified that they did not know the appellant, and never had any dealings of any kind with him. A number of witnesses further testified that the appellant bore a good reputation in the community in which he resided.
>
> "In rebuttal one of the prohibition agents testified that in the latter part of December, 1928, he overheard a conversation between the Superintendent of the Great Northern and Northern Pacific terminals in Seattle and J. Arthur Boyd, one of the defendants named in the indictment; that the Superintendent asked Boyd if the colored man from Portland had arrived the other night; that Boyd answered in the affirmative that he was sorry that the Superintendent did not meet him; that he handled the Portland end of the business and had been very successful. The Superintendent further asked Boyd if they were still handling liquor to Portland in baggage cars and Boyd answered in the negative, stating that they had cut that out and were transferring it down there in automobiles."

The situation in the cited case and the case at bar is parallel in every respect. It needs no argument to demonstrate that the testimony of Special Agent Main relative to statements alleged to have been made to him by two of the witnesses (who had theretofore testified under oath favorably to petitioner, inconsistent with and contradictory of their former testimony, for which no proper foundation had been laid by the Government in the interrogation of these wit-

nesses at the time of the taking of their deposition) is as essentially hearsay as the testimony of the prohibition agent concerning the conversation overhead by him.

In both instances the witness was permitted to testify over objection and exception by counsel as to what some other person said when such person was not before the Court or under oath.

Circuit Judge Rudkin, writing for a unanimous Court, said in part as follows:

> "It will be seen at a glance that the rebuttal testimony offered by the Government had no tendency to show probable cause. If we assume that the appellant was the colored man referred to in the conversation between the Superintendent and Boyd, the statements of Boyd were not competent evidence against the appellant, and had no tendency to connect him with the conspiracy charged. *Sugarman* v. *United States* (No. 5915), 34 F. (2nd) 663, decided November 4, 1929. Again, testimony tending to show that the appellant was seen in the coach yards, even under suspicious circumstances, had no tendency to prove that he had committed a crime, much less the crime of conspiracy, in the Western District of Washington. If the Government established probable cause at all, therefore, it was through the copy of the indictment, and that alone.
>
> "In discussing the effect of an indictment in such cases the Circuit Court of Appeals for the Sixth Circuit, in *Meehan* v. *United States*, 11 F. (2d) 847, 849, said:
>
> > 'When we come to the function of the indictment as evidence, we find some confusion in the cases, or at least in the thoughts expressed. If it were taken as *prima facie* evidence of guilt, in the largest sense of the term *"prima facie,"* logical difficulties would arise, because then it would continue of full force, and at the end of every removal proceeding there would be a conflict of evidence, which that tribunal could not try. The cases usually speak of it as *prima facie* evidence, not of guilt, but of the existence of probable cause. This is perhaps another way of saying that it raises an initial presumption,

> which might as well be arbitrary as evidential, which continues until it is in some vital particular overcome by entirely convincing testimony. Wherever there is affirmative proof, unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment the removal should be made. These we take to be the applicable principles as expressed in the late cases. *Haas* v. *Henkel,* 216 U. S. 462; *Price* v. *Henkel,* 216 U. S. 488; *Beavers* v. *Henkel,* 194 U. S. 73, 85; *Morse* v. *U. S.* 267 U. S. 80.'
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> "Measured by this rule, we think the government failed in its proof. As against the indictment, the appellant offered uncontradicted testimony tending to show that he was not guilty of the offense charged, and in this he was corroborated by other witnesses. This testimony, we think, was sufficient to overcome any presumption arising from the indictment, and it was then incumbent on the government to offer some additional proof tending to show probable cause. In this respect the government utterly failed."

In *Meehan* v. *United States,* 11 Fed. (2d) 847, 849, it was said:

> "Wherever there is affirmative proof unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied." (Cases cited.)

In *United States* v. *Glass,* 25 Fed. (2d) 941, it was also held that the evidence adduced at the hearing before the Commissioner in favor of the defendant was sufficient to rebut the presumption raised by the indictment and the defendant was discharged.

United States v. *Green,* 136 Fed. 618, is another case involving removal proceedings. The Court, in discussing the question of probable guilt and sufficiency of evidence in a removal proceeding, said (p. 627):

> *"The defendant in a criminal case is presumed to be innocent until proven guilty, and this presumption obtains in favor of a defendant accused by the govern-*

ment of the United States to the same extent and with the same force as when the accusation is made by an individual. This presumption of innocence obtains in a proceeding of this character. The government is not under obligation to establish a case beyond a reasonable doubt, or beyond a doubt establish cause for believing that a crime has been committed and that the defendant is guilty of such offense. *However, suspicion, guess, surmise, conjecture, and speculation, with some evidence as a basis, do not establish probable cause in the eye of the law.* The evidence must point to crime and indicate the defendant as the probable criminal.

"'Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.' *Wheeler* v. *Nesbitt, et al.,* 24 How. 544. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.' *Heyne* v. *Blair,* 62 N. Y. 22. See, also, *Bacon* v. *Towne,* 4 Cush. 217; *Carl* v. *Ayers,* 53 N. Y. 14; *McGurn* v. *Brackett,* 33 Me. 331. 'It is a reasonable ground for believing a person guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason.' *Wanser* v. *Wyckoff,* 9 Hun 178. See, also, *Anderson* v. *How,* 116 N. Y. 336; *Wheeler* v. *Nesbitt,* 24 How. 544; *Lack* v. *Mitchell,* 23 Ind. 67; *Hays* v. *Blizzard,* 30 Ind. 457; *Driggs* v. *Burton,* 44 Vt. 124; *Mitchell* v. *Wall,* 111 Mass. 492; *Harpham* v. *Whitney,* 77 Ill. 32. *There is no reasonable ground for believing a person guilty of a crime when the only fact proved is just as consistent with his innocence as with his guilt. There is no probable cause to believe a crime has been committed when the only fact shown is as consistent with the non-existence as the existence of a crime.* It is true that in some of the cases it is stated that 'probable cause' is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is

guilty of the offense. *Anderson* v. *How*, 116 N. Y. 336. It will be seen there must be 'circumstances sufficiently strong in themselves to warrant a cautious man in his belief.' Suspicion (Webster) is 'the act of suspecting; the imagination or apprehension of the existence of something without proof, or upon very slight evidence or upon no evidence.' No one will contend that this suspicion constitutes 'reasonable cause,' as cause must be based on known facts, or results from which the existence of facts causing the result is certain, and these facts must point to guilt in the estimation of a reasonable mind." (Italics ours.)

In *In re Wood*, 95 Fed. 288, it was held that although an indictment constitutes a *prima facie* showing of probable cause, it may be rebutted by other testimony and the prisoner in that case was discharged from custody because the evidence offered on his behalf was held to have outweighed the weight of the indictment. On page 290 the Court said:

"This question is gone into very fully in *Re Dana*, 68 Fed. 886. In that case the court quotes from the case of *In re Wolf*, 27 Fed. 606, as follows: 'If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as prima facie showing that a crime has been committed by the party charged at the place alleged, and, if nothing else appears, to order a removal of the party charged. But I have no doubt the judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. *This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed and strictly pursued.* The government asking a removal is required to fully comply with the law.' Other cases to the same effect are also cited—among them, that of *U. S.* v. *Fowkes*, 49 Fed. 50, where the court, admitting the indictment in evidence, found it insufficient on hearing the defendant's evidence; stating that the court may treat an indictment as sufficient authority for holding the relator, or it may not, as circumstances

seem to require. And the Court, in *Re Dana,* in quoting from the circuit court of appeals affirming the case last cited, says: "We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon an indictment alone, but it would be going much too far to hold that in all cases * * * the judge is precluded from hearing any other evidence than" the indictment; *and the court held that the judge was in that case justified in requiring that he should be satisfied, before he would deprive the relator of his personal liberty and order his transfer to distant state for trial (Missouri), that there was evidence on which a jury might convict in that state, and that there was no error by the judge in his requiring, after the evidence given by the defendant, "other evidence than the indictment itself, that the court in Missouri had cognizance of the offense, and in discharging the accused upon failure of the government to comply with that requirement."'"* (Italics ours.)

In *United States* v. *Andrade,* 10 Fed. (2d) 572, it was held that before an order of removal is granted the Judge must be satisfied that there is probable cause to believe that the defendant sought to be removed is guilty of the offense charged. The meaning of "probable cause" is discussed in the course of the opinion where, at page 573, the Court said:

"'The meaning of the term "probable cause" is very well defined. In *Stacey* v. *Emery,* 97 U. S. 642, 24 L. Ed. 1035, it was said to be: "Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty."'"

"* * * *Wheeler* v. *Nesbitt, et al.,* 24 How. 544, 16 L. Ed. 765. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.'"

In the case of *In re Richter,* 100 Fed. 205, it was said:

"* * * it (the indictment) is not conclusive, and if so treated for all the purposes of the examination,

> the just provisions in that behalf are of no practical value. In the application for removal, at least, *if doubt is raised in any material aspect of the charge the indictment must be supported by proof aliunde* . . ."

Accord: *United States* v. *Johnston*, 292 Fed. 491; *United States* v. *Greene*, 100 Fed. 941, 945, 949; *United States* v. *Keough*, 48 Fed. (2d) 246; *Ex parte Bullard*, 53 Fed. (2d) 206, 207; *United States* v. *Morse*, 287 Fed. 906.

Nor does *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142, require such a rule as has been adopted in the Second Circuit. It is said in the opinion of the Circuit Court of Appeals that the Court is not committed to the proposition that the reception of evidence adduced by a defendant in removal proceedings is a mere ritual and that the Commissioner would be required to give reasonable latitude to the defendant in the presentation of his proof. Nevertheless the Court in the instant case has definitely taken the position that the finding of the Commissioner as to probable cause will not be disturbed "no matter how flagrantly mistaken he may be" and in an earlier decision (*United States ex rel. Scharlon* v. *Pulver, supra*, 54 Fed. [2d] 261) "if the prosecution chooses to take the chance that the indictment alone will satisfy him it will always be safe on habeas corpus." These views cannot possibly be reconciled with the thought that the writ of habeas corpus in removal proceedings affords the defendant the opportunity intended for him by the decision of this Court in *Tinsley* v. *Treat, supra*, 205 U. S. 20, to have tested the question as to whether or not there was evidence independent of the indictment sufficient to support a finding of probable cause to believe him guilty. It is clear, of course, that the Commissioner is not required "to hold a preliminary trial and if probable cause is shown on the Government's side to set it aside because on the other evidence he believes the defendant innocent," but that is decidedly different from holding that the finding of probable cause will not be reviewed if a duly certified copy of the indictment found in the demanding jurisdiction be present as part of the Government's case for removal.

In the case of *United States ex rel. Hughes v. Gault, supra,* there was in fact evidence other than the indictment showing the relator's complicity in the crimes alleged in the indictment. The relator there proposed to show that the charge made against him and a large number of other persons, firms and corporations, of having violated the Sherman Anti-Trust Law, was groundless, and after having been permitted to introduce a quantity of "defensive" evidence sought to further develop his case by the submission of confirmatory proof. The petitioner in the case at bar conclusively established by the testimony of all of the persons admittedly implicated in the commission of the offense charged in the indictment, as well as by other proof, that he had *nothing* whatsoever to do with any of the things or matters charged in the indictment. *The competent evidence made him a stranger to the case rather than one who seeks to excuse himself for the commission of the acts constituting the charge against him.* The question is a pointed one. Shall the fact that the Commissioner gave "latitude" to a defendant in removal proceedings in the presentation of his proof be a bar to a review of the finding made by him even if there is no evidence sufficient to support the conclusion reached? And is it true that the decision of the Commissioner is "safe on habeas corpus" even if it finds support only in the indictment and there is an overwhelming amount of undisputed proof establishing conclusively that the defendant was not implicated in any manner in the commission of the offenses charged in the indictment? It is evident that nothing has been said by this Court authorizing the view that the Commissioner's decision must stand no matter how "flagrantly mistaken" or palpably unjust it may be.

It is respectfully submitted that the statement made in the opinion by Mr. Justice Holmes in the case of *United States ex rel. Hughes* v. *Gault, supra,* with respect to the informality of removal proceedings and the rules of evidence applicable thereto was *obiter dicta* inasmuch as the only question of evidence presented concerned itself with the dis-

cretion of the Commissioner in excluding certain confirmatory proof and that matter was not passed upon in the decision of this Court. It does not appear that it was intended to allow for the reception of hearsay and incompetent evidence such as that of the testimony of the witness Main.

In the light of the facts in the case at bar and under the authorities cited we submit that the Circuit Court of Appeals erred in limiting its jurisdiction to the purely formal determination of whether or not the Commissioner had heard the evidence. Essential and important it was to determine whether the Commissioner had reached a valid and legal conclusion. Otherwise to rule was to abdicate the powers of judicial review of the Commissioner's acts and to render nugatory all the safeguards theretofore erected in removal proceedings. The questions involved are of the utmost importance not only in the case at bar, but in all removal proceedings, and it is essential for this Court clearly to enunciate the applicable rules and to resolve the controversy which has arisen through the radical attitude adopted by the Circuit Court of Appeals for the Second Circuit.

II.

Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

(Assignments of Error Nos. 8 to 11, R. 63-64.)

That the rebuttal testimony of Special Agent Main with respect to alleged inconsistent and contradictory statements made by witnesses for petitioner was incompetent is clear beyond question. *Larkin* v. *Nassau Electric R. R. Co.*, 205 N. Y. 267; *Ayers* v. *Watson*, 132 U. S. 394; *Mattox* v. *United States*, 156 U. S. 327; *Bennett* v. *Hoffman*, 289 Fed. 797, 799. His testimony was likewise incompetent to show bias, prejudice, hostility, interest or hope for reward on the part of said witnesses unless a proper foundation was laid therefor.

People v. *Mallon*, 116 App. Div. 425, affirmed 189 N. Y. 520; *Stacy* v. *Graham*, 14 N. Y. 492; *Taylor* v. *United States*, 89 Fed. 954, 956. This was conceded by the Circuit Court of Appeals which wrote:

> "The relator raises a second point. On rebuttal the prosecution called witnesses to impeach two of the accused's witnesses by imputing to them statements contradictory to their testimony on the stand. The ground had not been prepared for this evidence by asking the impeached witnesses on cross-examination whether they had not so contradicted themselves. That was indeed a condition and made the testimony in rebuttal incompetent, especially as the prosecution apparently already knew the contradictions at the time of the cross-examination. Wigmore §1025. Thus the commissioner considered evidence which strictly he should not have heard. Nevertheless we are not disposed to require him to reconsider his decision. There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in courts. *U. S.* v. *Greene*, 108 F. R. 816, 819, 820; *U. S.* v. *Kallas*, 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in *U. S. ex rel. Hughes* v. *Gault, supra* (271 U. S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradiction and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings."

Such reasoning is not tenable, either under the authorities or upon the facts of the case at bar. *Special Agent Main was present when the depositions of the witnesses for petitioner were taken. The contradiction was already known to him at that time. No effort was then made to cross-examine*

on this point, although cross-examination was both extensive and thorough.

There was no duty upon petitioner to obtain an explanation of an alleged contradiction under these circumstances. A year had elapsed between the time the depositions were taken and the date of Main's testimony. Nor was opportunity given to petitioner to obtain such explanation at that time. The Government pressed for final determination and contended the testimony was relevant and competent. In this the Commissioner concurred.

To say that the ordinary rules of evidence are inapplicable in removal proceedings is to disregard the well-established rule that such proceedings are in their very nature judicial and not ministerial. The Commissioner acts as an inferior judicial official rather than as a ministerial officer. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, and is controlled and guided by the commonly applied principles of legal evidence. He proceeds under Section 591 of Title 18, United States Code, according to the law of the state wherein he sits. *United States* v. *Morse,* 287 Fed. 906; *United States* v. *Beavers,* 125 Fed. 778. This necessarily includes the rules of evidence of that state.

In removal proceedings the Commissioner must act upon competent and legal evidence. *Cf. Greene* v. *Henkel,* 183 U. S. 249. His powers in this regard are analogous to those of referees and special masters in bankruptcy, to committing magistrates and to other officials whose acts and conduct are subject to judicial review. *People ex rel. Perkins* v. *Moss,* 187 N. Y. 110; *People* v. *Shenk,* 142 N. Y. Supp. 1081; *Moore* v. *Harvey,* 236 App. Div. 815, 260 N. Y. Supp. 142.

In *People ex rel. Perkins* v. *Moss, supra,* 187 N. Y. 410, the Court said:

> "If the information which was laid before the magistrate furnished no *legal evidence* of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime

charged had been committed, he was without jurisdiction to cause the arrest of the relator, and the latter was entitled to resort at once for his protection through a writ of habeas corpus."

In *United States* v. *Green*, 100 Fed. 941, it was held that under Section 591, the proceeding before a Commissioner for the commitment of a person so arrested, is the same as that prescribed by the laws of the State for proceedings before an examining magistrate; the only issue before the Commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged. The evidence admissible upon that issue is determined by the State practice.

In *People* v. *Shenk*, 142 N. Y. Supp. 1081, it was held that the *prima facie* case before the committing magistrate must be based upon legally competent evidence. Authorities holding for the proposition that the Magistrate's Court and the United States Commissioner must found their conclusions upon legally competent evidence may be multiplied *ad infinitum*. The Federal Courts are even more careful than the local Courts in the reception of only legally competent evidence upon a preliminary hearing. The fatal defect in the proof adduced through Special Agent Main is not founded upon technical considerations, but, on the contrary, rests upon extremely well-established principles of law which find support in common sense and sound logic and is ground for reversal.

Neither *United States* v. *Greene*, 108 Fed. 816, nor *United States* v. *Kallas*, 272 Fed. 742 (both of which District Court decisions were cited by the Circuit Court of Appeals) establish the principle that rules of evidence are inapplicable in a removal proceeding. In both cases stress was laid upon the necessity of resting a finding of probable cause upon *competent* evidence. Nor does the reasoning in *United States ex rel. Hughes* v. *Gault*, *supra*, 271 U. S. 142, require such a rule. This Court in that case did not specifically decide the point now involved and the remarks in the opinion concern-

ing hearings before laymen in removal proceedings were not intended to cover such a situation as is here presented. Most removal proceedings are instituted before United States Commissioners. All removal orders are signed by United States District Judges. This is a judicial act. It would be an unfortunate as well as illogical precedent which would sanction the presentation of incompetent and hearsay testimony in a removal proceeding so that the judicial duty of the District Judge to sign such removal order would necessarily have to be based upon *non-judicial* hearsay and incompetent evidence. The questions here presented are novel and have never been passed upon by this Court. They are meritorious ground for review.

CONCLUSION.

The evidence, including even the utterly incompetent testimony of Special Agent Main adduced in a belated and desperate effort to support the application for removal, properly evaluated, leaves no room to doubt that petitioner not only completely destroyed the initial, technical presumption of probable cause arising from the indictment and proof of identity, but overwhelmingly establish his innocence of any wrongdoing (compare the statement of Mr. Creel at R. 78). Counsel for the Government in the demanding jurisdiction as well as in the remanding jurisdiction must have known at all times of the availability of Special Agent Main's testimony. Main was present when the depositions were taken. The one and only explanation for the Government's failure to call Special Agent Main to the stand during the year and a half that the proceeding has been in progress was the conviction of counsel for the Government that the testimony of Special Agent Main was hearsay and incompetent.

What value in law can Special Agent Main's testimony as to what certain witnesses said to him out of court and not under oath, inconsistent with and contradictory of their sworn testimony, have against the cumulative weight of petitioner's uncontradicted statement establishing his innocence,

beyond peradventure of doubt, the testimony of his wife and character witnesses and the sworn depositions of five of the defendants named in the indictment attesting to petitioner's complete innocence?

It is respectfully submitted that to order the removal of petitioner upon the basis offered therefor by the Government is tantamount to annihilating the safeguards developed by the law against the injudicious removal of a person to a foreign jurisdiction and to unjustifiably subject him to all of the sufferings and hardships that such an order entails.

The order of the Circuit Court of Appeals for the Second Circuit and that of the District Court for the Southern District of New York should be reversed, the writs of habeas corpus and certiorari sustained and the petitioner discharged.

Respectfully submitted,

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